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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1990

GREGORY LYNN CUMMINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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April 17, 1991

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QUESTION PRESENTED FOR REVIEW

Whether, in a case involving a vehicle search which occurred during a traffic stop for failure to use a turn signal, the Fourth Amendment requires a subjective test, an objective test, or some combined test in determining whether the stop was pretextual.

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Certiorari should be granted because there is a conflict among the circuits and states on the issue of whether a subjective or objective standard applies in determining whether a traffic stop is pretextual under the Fourth Amendment, and because this Court has never ruled on the question presented.

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GREGORY LYNN CUMMINS,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Gregory Lynn Cummins, petitions the Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINION BELOW

The opinion of the United States Eighth Circuit

Court of Appeals of November 30, 1990 is reported as *United States v. Cummins*, 920 F.2d 498 (8th Cir. 1990), and is reprinted in the Appendix to this Petition. A3. On January 17, 1991, the Eighth Circuit denied Petitioner's Petition for Rehearing and Rehearing En Banc. A14.

JURISDICTION

The Eighth Circuit Court of Appeals decided this case on November 30, 1990 and denied rehearing on January 17, 1991. The petition is filed within ninety days of that date and is thus timely. S. Ct. Rule 13.1.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, ...

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; . . . .

STATEMENT OF THE CASE

At approximately 11:40 p.m. on November 14, 1988, Little Rock, Arkansas Police Officer Dan Bernal was driving east on East Sixth Street in Little Rock, Arkansas. As he approached the intersection of Sixth and Bond Streets, the traffic signal was red for his lane of traffic. While at the intersection, his attention was drawn to the fact that a green Volkswagen was stationary on Bond Street at the intersection, despite the fact that the driver had a green light.

Petitioner and Tim Akins, the two occupants of the car, both looked at the officer and looked back at the light several times. After the light turned red for the Volkswagen, petitioner turned right on to Sixth Street and proceeded east. Officer Bernal then decided to follow the Volkswagen. Bernal followed for several blocks and maintained a distance of about three to four car lengths behind it. As he followed them, they glanced back at him. Petitioner was not speeding, nor was there any weaving or erratic driving of any kind.

Petitioner pulled into a closed car wash, and Bernal stopped at a service station across the street where he continued to watch the occupants of the Volkswagen. Shortly thereafter, petitioner's car pulled back on to Sixth Street heading east and Bernal resumed following them. At the intersection of Sixth and Corning, petitioner turned right without signalling, and Bernal decided to make a stop.

A subsequent search of the vehicle revealed a quantity of controlled substances. Petitioner and Akins were charged with possession of cocaine with intent to deliver.

Petitioner moved to suppress the evidence seized in the search of the vehicle on the ground that, *inter alia*, the initial stop was pretextual. At the suppression hearing, Officer Bernal testified that, although he had a legitimate objective basis for making a traffic stop of the vehicle (*i.e.,* turning without signalling), he would not have made the stop had petitioner and Akins not otherwise drawn his attention by their suspicious behavior. The District Court denied the motion to suppress, reasoning that the fact that an objective basis for the stop existed was all that was necessary to legitimize the stop under the Fourth Amendment. The court further reasoned that the officer's subjective basis for the stop was irrelevant.

Petitioner entered a conditional plea of guilty and appealed the denial of his motion to suppress to the Court of Appeals for the Eighth Circuit. That court agreed with the district court and expressly rejected the test for pretextual stops employed by the Tenth and Eleventh Circuits. Under that test, the question is not whether the officer could have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of an invalid motivation. Instead, the Court of Appeals aligned itself with circuits that approach the pretextual stop question under a strict standard of objective reasonableness.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A CONFLICT AMONG THE CIRCUITS AND STATES ON THE ISSUE OF WHETHER A SUBJECTIVE OR OBJECTIVE STANDARD APPLIES IN DETERMINING WHETHER A TRAFFIC STOP IS PRETEXTUAL UNDER THE FOURTH AMENDMENT, AND BECAUSE THIS COURT HAS NEVER RULED ON THE QUESTION PRESENTED.

A.

This case presents a question never before decided by this Court: what standard applies in determining whether a traffic stop that leads to a search is pretextual and therefore in violation of the Fourth Amendment: an objective, subjective, or combined test. The circuits and states are about equally divided on which test applies.

B.

Under the Fourth Amendment, a police officer may stop a travelling motorist if he has probable cause to believe that the motorist has committed a violation of the law in his presence. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Brinegar v. United States*, 338 U.S. 160 (1949). An officer may also make an investigative stop if he has a reasonable suspicion that the person is engaged or has engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411 (1981); *Delaware v. Prouse*, 440 U.S. 648 (1979). In such instances, the stop is justified if, under the totality of the circumstances, the officer has

a particularized and objective basis for suspecting criminal activity. *United States v. Cortez, supra.* However, the courts agree that the Fourth Amendment does not permit the police to use a minor traffic violation as a pretext to stop a vehicle and detain its occupants. *See United States v. Lefkowitz,* 285 U.S. 452 (1972); *United States v. Portwood*, 857 F.2d 1221 (8th Cir. 1988); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986); *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978); *United States v. Santana*, 485 F.2d 365 (2d Cir. 1973); *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968); *Taglawore v. United States*, 291 F.2d 262 (9th Cir. 1961).

C.

1. *The split in the circuits shown in this case*

In this case, the court below evaluated petitioner's argument that his stop was pretextual by utilizing a strict standard of objective reasonableness: whether there was *any* legal basis for making the stop; *i.e.*, whether the officer *could* have made the stop. *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990). In so holding, the Eighth Circuit expressly rejected the standard employed by at least two other circuits: whether a reasonable officer *would* have made the stop in the absence of an invalid purpose and not *could* have. *Id.*, citing *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986). The Eighth Circuit thus aligned itself on this precise issue with the Third, Fifth, and Seventh Circuits. *United States v. Hawkins,* 811 F.2d 210 (3rd Cir.1987), *cert. denied,* 484 U.S. 833; *United States v. Causey,* 834 F.2d 1179 (5th Cir.1987); *United States v. Trigg,* 878 F.2d 1037 (7th Cir.1989).

2. *The split shown among the states*

State cases expressly following the Tenth and Eleventh Circuits are: *Monroe v. State,* 543 So.2d 298 (Fla.1989);[1] *Brown v. State,* 188 Ga.App. 184, 372 S.E.2d 514 (1988); *State v. Garcia,* 461 N.W.2d 460 (Iowa 1990); *State v. Morocco,* 99 N.C.App. 421, 393 S.E.2d 545 (1990).

State cases holding that a strict objective test applies and expressly following authority relied upon by the court below are: *State v. Jeney,* 163 Ariz. 293, 787 P.2d 1089 (App. 1989); *State v. Law,* 115 Idaho 768, 769 P.2d 1140 (1989); *State v. Mann,* 103 N.M. 660, 712 P.2d 6 (App. 1985); *State v. Olaiz,* 100 Or.App. 380, 786 P.2d 734 (1990); *Commonwealth v. Jones,* ___ Pa.Super. ___, 578 A.2d 527 (1990); *Bosworth v. Commonwealth,* 375 S.E.2d 756 (Va.App.1989).

At least two states cannot decide exactly which test applies. Texas applies both tests. *See, e.g., Black v. State*, 739 S.W.2d 240 (Tex.Crim.App. 1987) (subjective test); *Gordon v. State,* 767 S.W.2d 866 (Tex.Crim. App. 1989) (objective test); *State v. Garcia,* 794 S.W.2d 472 (Tex.Crim.App.1990) (subjective test). Illinois has applied both tests in the same case. *People v. Guerrieri,* 194 Ill.App.3d 497, 141 Ill.Dec. 580, 551 N.E.2d 767, 770 (5th Dist.1990).

D.

The test employed by the Tenth and Eleventh

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[1] Prior to *Guzman*, a Florida appeals court so held in *Diggs v. State,* 301 So.2d 513 (Fla.App.1974).

Circuits is the better and should be adopted by this Court, for several reasons:

1. The strict objective test employed by the court below, which asks no more than whether some objective basis exists for the stop, permits and even encourages arbitrary intrusions in situations such as traffic stops. As the Tenth Circuit stated in *Guzman, supra*:

> Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop. To paraphrase one commentator, in the absence of standardized police procedures that limit discretion, whether we are simply allowed to continue on our way with a stern look, or instead are stopped and subjected to lengthy intensive interrogation when we forget to wear our seat belts, turns on no more than "the state of the digestion of any officer who stops us or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin."

864 F.2d at 1516 (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN.L.REV. 349, 416 (1974)).

2. The pure objective test places no limits on police discretion. As long as the officer can say that some traffic violation took place (as in this case where petitioner failed to use his turn signal), even though a stop would not otherwise have been made, it makes no difference whether the stop was really made because of race, sex, hair length, method of dress, idle ecuriousity,

gross bad faith, etc. This Court never intended to go that far, and none of its decisions support the application of such a test. Indeed, "[i]t is the need to restrain the arbitrary exercise of discretionary police power that has been the driving force behind the Court's decisions forbidding police practices not amenable to objective review." *Guzman*, 864 F.2d at 1516 (quoting *Brown v. Texas*, 443 U.S. 47 (1979), and *Deleware v. Prouse*, 440 U.S. 648 (1979)).

3. The proper inquiry in determining whether the Fourth Amendment has been implicated "is not *why* the officer deviated from the usual practice in this case but simply that he *did* deviate." 1 W. LAFAVE, SEARCH AND SEIZURE, § 1.4(e), at 94 (2d ed.1987). Such a test, which is neither wholly subjective nor wholly objective, is not inconsistent with this Court's decisions which emphasize an objective inquiry into Fourth Amendment activity. *Scott v. United States*, 436 U.S. 128, 136 (1978); *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985). It also serves the equally important purpose of ensuring that discretionary police conduct does not go unchecked and without meaningful judicial review.

E.

Precedent from this Court as well as that from the other circuits make it clear that pretextual stops violate the Fourth Amendment. In its opinion below, however, the Eighth Circuit has adopted a bright line rule which virtually obliterates the pretext doctrine and renders it virtually impossible to ever find that a stop was pretextual and thus unconstitutional. Until the opinion below was handed down, the Eighth Circuit would at least examine the facts to determine if there was evidence of

pretext. *See United States v. Portwood*, 857 F.2d 1221, 1223 (8th Cir. 1988). Now, however, the only relevant question is whether a traffic violation took place. Under the approach adopted here, there is no longer such a thing as a pretextual stop in the Eighth Circuit.

Had the Eighth Circuit applied the proper test and asked whether a reasonable officer would have made the stop in question, the answer would clearly have been "no." This is supported by the officer's own testimony that no one is ever stopped for simply failing to use his or her turn signal. Clearly, he would not have stopped petitioner but for his bare suspicion of drug activity. Since reasonable suspicion did not otherwise exist for the stop, the court would have had to conclude that it was pretextual and thus violated the Fourth Amendment.

The instant case gives this Court the opportunity to resolve the split in the circuits and states that exists regarding the proper test to be applied when evaluating a claim that a discretionary traffic stop was pretextual. It further gives the Court the opportunity to clarify the bounds of the pretext doctrine and how and whether *Scott* should apply.

> What this means, then, is that the *Scott* approach of disregarding "the underlying intent or motivation of the officers involved" is correct even in the situation now under discussion, *provided* there are more reliable and feasible means of determining in a particular case whether or not the challenged arrest or search was arbitrary. This can best be accomplished by more widespread application of the requirement utilized by the

Supreme Court in *South Dakota v. Opperman*, namely, that the Fourth Amendment activity "was carried out in accordance with *standard procedures* in the local police department." If and when the Court makes broader use of that check upon arbitrariness, which unfortunately it has failed to do in circumstances quite obviously calling for that kind of a restriction, there then would be no reason to question the proposition put forward by the Court in *Scott*. There would then exist standards against which to examine the police conduct in individual cases; in keeping with the philosophy underlying the *Camara-Prouse* line of cases, decision of whether to arrest and search when probable cause is present would not be left entirely to officers in the field, and the conduct of individual officers could realistically be judged by resort to those standards.

LAFAVE, *supra*, at 96-97 (footnotes omitted; emphasis in original). *See also* Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221, 249 (1989).

F.

The question presented here is now ripe for decision by this Court, and this case is the proper vehicle for deciding it since the facts are simple and the legal issue clear.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 17, 1991

APPENDIX

United States v. Cummins, 920 F.2d 498 (8th Cir.1990) A3

United States v. Cummins, order denying rehearing and rehearing en banc A14

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1050

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Arkansas.
Gregory Lynn Cummins,	*	
	*	
Appellant.	*	

No. 90-1199

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Arkansas.
Timothy Akins, a/k/a	*	
Michael Mayfield,	*	
	*	
Appellant.	*	

Submitted: August 29, 1990
Filed: November 30, 1990

Before McMILLAN, BOWMAN, Circuit Judges, and CAHILL,* District Judge.

Defendants Gregory Lynn Cummins and Timothy Akins appeal the denial by the District[1] of their motions to suppress evidence seized during searches of automobiles in two separate traffic incidents. Both defendants entered a plea of guilty to drug trafficking and firearm offenses reserving the right to appeal the denial of their motions to suppress. We affirm.

I.

The first traffic incident in question involved both Cummins and Akins. On November 10, 1988, at approximately 11:40 p.m., the unusual behavior of occupants of a 1974 green Volkswagen caught the attention of Officer Dan Bernal, a seven-year veteran of the Little Rock Police Department. Bernal, who was patrolling east on Sixth Street, was stopped for a red light at the intersection of Bond and Sixth in Little Rock, Arkansas. The Volkswagen, northbound on Bond Street, remained at a standstill despite the green light signalling it to proceed. Rather than proceeding, the driver (Cummins), along with his passenger (Akins), kept glancing at Bernal. Not until the signal changed to red for the Bond Street traffic did Cummins finally proceed

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[1] The Honorable Elsijane T. Roy, Senior United States District Judge for the Eastern District of Arkansas.

by turning right onto Sixth Street. These actions aroused Bernal's suspicions and he began to follow the car. For several blocks along Sixth Street, Cummins and Akins continued glancing over their shoulders at Officer Bernal, who was maintaining a distance of approximately four car-lengths behind them. This surveillance-in-motion came to a momentary halt when the Volkswagen turned off Sixth Street into a closed car wash. Cummins and Akins then continued to watch Bernal, who had pulled into a service station across the street. When the Volkswagen left the car wash and continued east on Sixth Street, Bernal followed it. At the intersection of Sixth and Corning, Cummins made a right turn without giving a signal. Observing this traffic violation, Bernal immediately turned on his bluelights. Cummins stopped, got out of the Volkswagen, and approached Bernal as he was getting out of the police car.

After explaining the reason for the stop and obtaining Cummins' license, Bernal asked Cummins to explain his unusual behavior. Cummins replied that he had been distracted by his passenger's conversation about "girlfriend problems" and said the passenger's name was "Tim." Cummins appeared very nervous throughout this exchange. After calling the police department for a license and vehicle check, Bernal walked over to the Volkswagen and asked the passenger for his name. Akins identified himself as "Michael Mayfield." This inconsistency further aroused Bernal's suspicions. He returned to his car and radioed for a back-up. Within five minutes, Officer Jim McDaniels arrived. Cummins stayed with McDaniels while Bernal returned to the Volkswagen to ask Akins for proof of identification. The name on the driver's license he produced was

"Timothy Akins." Bernal escorted Akins to the patrol unit and placed him in the back seat. Akins was evasive and appeared ready to flee if given the opportunity.

Bernal returned to the Volkswagen and looked inside with his flashlight. He saw a clear plastic bag containing what appeared to be marijuana on the floor behind the passenger's seat. As a result of this discovery, Bernal placed Cummins and Akins under arrest and called for a tow truck to remove the Volkswagen. Pursuant to police department procedures, Bernal began an inventory search of the Volkswagen in preparation for its impoundment. Inside the passenger compartment, Bernal found two beepers, a black shaving kit containing U.S. currency, a duffel bag containing marijuana and cocaine, a "Crown Royal" bag containing more drugs, and a loaded "Tech 9" semi-automatic pistol.

The second traffic incident involved only Akins. On January 26, 1989, Officers James Dickson and John Gourtney of the Little Rock Police Department were called to the scene of a single-car accident. A Chevrolet Chevette had crashed into the front-yard fence of a residence. Although no one was in the car when the officers arrived, witnesses identified Akins, who was standing nearby, as the driver. When the officers tried to question Akins, they realized that he was either too drunk or too drugged to provide any coherent answers. The officers arrested Akins for driving while influenced by alcohol or drugs. After calling for a tow truck to remove Akins' car, the officers began an inventory search of the vehicle. In the passenger compartment, they found a loaded sawed-off shotgun, marijuana, and a sack containing crack, cocaine, and U.S. currency.

Cummins and Akins moved to suppress the evidence seized by the Little Rock police officers during the two separate traffic incidents. At the suppression hearing, Officer Bernal testified that he probably would not have stopped the green Volkswagen on November 10, 1988 for the traffic violation if the defendants had not behaved so suspiciously. Pointing to the officer's underlying motivation, the defendants argued that the initial stop was pretextual and any evidence seized in its wake should be suppressed. The magistrate[2] disagreed, finding that Bernal had a reasonable and objective basis for making the initial stop and that the resulting searches were proper. The magistrate also concluded that the motion to suppress evidence seized during the inventory search of Akins' car on January 26, 1989 should be denied. The district court adopted the magistrate's recommendations and denied the motions to suppress. For reversal, defendants reassert the arguments made during the proceedings below.

II.

A.

Defendants argue that Officer Bernal's initial stop of the green Volkswagen was pretextual, because his real reason for making the stop was based on his suspicions aroused by their strange behavior rather than on Cummins' failure to signal a right turn. The defendants conclude that the stop was unreasonable under the Fourth Amendment. We disagree. When an officer observes a traffic offense--however minor--he has proba-

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[2] The Honorable H. David Young, United States Magistrate, for the Eastern District of Arkansas.

ble cause to stop the driver of the vehicle. *See Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *United States v. Pillow*, 842 F.2d 1001 (8th Cir.1988). In our view, this otherwise valid stop does not become unreasonable merely because the officer has intuitive suspicions that the occupants of the car are engaged in some sort of criminal activity. It is also our view that the stop remains valid even if the officer would have ignored the traffic violation but for his other suspicions. Although the Supreme Court has not directly decided this issue, the Court has told us in unmistakable terms that we are to make "an objective assessment of the officer's actions." *Scott v. United States*, 436 U.S. 128, 136 (1978). "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. The Court's language leaves little doubt that "the officer's actual state of mind at the time the challenged action was taken," *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985), is of no significance in determining whether a violation of the Fourth Amendment has occurred.[3]

[3] The officer's motive becomes relevant only after a determination is made that the Fourth Amendment actually was violated. When this threshold issue is resolved in the affirmative, the officer's state of mind may be relevant in determining whether the exclusionary rule should be applied. *Scott*, 436 U.S. at 139 n.13. *See United States v. Leon*, 468 U.S. 897 (1984) (exclusionary rule inapplicable where officer's good faith belief that defective warrant was valid was an objectively reasonable belief).

Although our circuit has declared in dictum "that pretextual stops are unreasonable under the fourth amendment," *United States v. Portwood*, 857 F.2d 1221, 1223 (8th Cir.1988), *cert. denied*, 490 U.S. 1069 (1989), when we apply Scott, noting the "standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved," 436 U.S. at 138, we cannot say that the stop here in question was pretextual. Officer Bernal had a legitimate reason -- the traffic violation -- for stopping the green Volkswagen and that is the end of our inquiry.

We reject the argument of Cummins and Akins that the applicable test is "not whether the officer *could* validly have made the stop but whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose." *United States v. Smith*, 799 F.2d 704, 709 (11th Cir.1986) (emphasis in original). Only the Tenth and the Eleventh Circuits have adopted this test,[4] and we expressly decline to join them. Instead, we align ourselves with those circuits that approach the pretextual stop or arrest question under the standard of objective reasonableness articulated by the Supreme Court. *United States v. Trigg*, 878 F.2d 1037 (7th Cir.1989); *United States v. Causey*, 834 F.2d 1179 (5th Cir.1987); *United States v. Hawkins*, 811 F.2d 210 (3rd Cir.1987), *cert. denied*, 484 U.S. 833. We thus agree with the conclusion expressed by the Seventh Circuit: "so long as the police are doing no more than they are legally permitted and objectively authorized to so, [the resulting stop or] arrest is consti-

[4] *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988); *Smith*, 799 F.2d 704 (11th Cir.1986).

tutional." *Trigg*, 878 F.2d at 1041 (relying upon *Causey*, 834 F.2d at 1184 ("[T]he Court has told us that where police officers are objectively doing what they are legally authorized to do ... the results of their investigations are not to be called in question on the basis of any subjective intent with which they acted.")). Like these other circuits, we see no reason for requiring an officer's state of mind to perfectly match his legitimate actions. Such symmetry is not required by the Constitution. Accordingly, we hold that because Officer Bernal had probable cause to believe that a traffic violation had occurred, his initial stop of the car driven by Cummins was valid.

B.

Our determination that a valid stop occurred does not end our inquiry, because Cummins and Akins argue that the fruits of the search were fruits of an unreasonable detention. We disagree. Under *Terry v. Ohio*, 392 U.S. 1, (1968), given the lawfulness of the initial stop, the question is whether the resulting detention was "reasonably related in scope to the circumstances which justified the interference in the first place." 392 U.S. at 20. Here, after stopping the green Volkswagen for the observed traffic violation, Officer Bernal asked Cummins why he failed to use his turn signal. This question was reasonably related to the purpose of the stop. Cummins answered that he had been distracted by his passenger's conversation. When Bernal attempted to confirm this explanation by questioning the passenger, he received an inconsistent answer. At this point, Bernal had justification for a greater intrusion unrelated to the traffic offense. The circumstances and unusual behavior he had encountered led him "reasonably to

conclude in light of his experience that criminal activity may [have been] afoot." 392 U.S. at 30. The officer had observed and could articulate (1) the defendants' peculiar behavior at the traffic light; (2) their attempts to evade his surveillance by pulling into the closed car wash; (3) their continuous furtive glances in his direction; (4) the nervous and evasive behavior of each defendant when asked routine questions; and (5) the inconsistent answers concerning Akins' identity. The totality of the circumstances known to Officer Bernal met the requisite level of reasonable suspicion under *Terry* and entitled him to detain the defendants until he had satisfied his suspicions.

C.

Cummins and Akins also argue that Officer Bernal's discovery of the marijuana on the rear floor of the car was invalid under the plain-view doctrine. There is no reason for us to address this particular argument because Bernal's actions were justified by the limited protective search doctrine. In *Michigan v. Long*, 463 U.S. 1032 (1983), the Court extended the *Terry* frisk of a person to a limited search of an automobile's interior. Similar to the facts here, the officers in *Long* discovered marijuana in the passenger compartment with the aid of a flashlight after stopping the driver for a traffic violation. Recognizing that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers," 463 U.S. at 1047, the Court held that once reasonable suspicion is established, a limited search of an automobile's interior is permissible. This limited search is no less permissible where, as here, the occupants have been removed from the automobile before the search is made. *See* 463 U.S. at 1052

("the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons").

Officer Bernal's action of looking into the passenger compartment of the Volkswagen with a flashlight did not exceed the limitations of a *Terry* search. As we apply an objective standard of reasonableness to this determination, our conclusion is not changed by Bernal's testimony that he had no subjective fear that either Cummins or Akins were armed. We therefore hold that the marijuana discovered by Officer Bernal in the passenger compartment of the Volkswagen was not subject to suppression under the exclusionary rule.

D.

Defendants' next argument that the search of the remainder of the car was without probable cause requires little discussion. Upon discovering the marijuana, Officer Bernal had probable cause to place defendants Cummins and Akins under arrest. The search of the Volkswagen which followed was permissible both as a search incident to arrest, *United States v. Robinson*, 414 U.S. 218 (1973), and as an inventory search, *Colorado v. Bertine*, 479 U.S. 367 (1987). Because no Fourth Amendment violation occurred, the motion to suppress the evidence found during the search was properly denied.

III.

Akins challenges the seizure of evidence in connection with his January 26, 1989 arrest. He claims that the inventory search of his car in which the officers discovered controlled substances and a loaded shotgun

was invalid. He does not dispute the validity of his arrest for DWI.

An inventory search will be upheld unless there is a showing that the police failed to follow standard procedures, acted in bad faith, or conducted the search for the sole purpose of investigation. *See Bertine*, 479 U.S. at 372. Akins has made no such showing. We therefore reject his challenge to the District Court's denial of his motion to suppress.

IV.

Finding no reason for reversal, we affirm the decision of the District Court denying defendants' motions to suppress.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 90-1050

United States of America,	*	
	*	
Appellee,	*	Order Denying Petition
	*	for Rehearing and Sug-
v.	*	gestion for Rehearing
	*	En Banc.
Gregory Lynn Cummins,	*	
	*	
Appellant.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of a lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

January 17, 1991